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IN THE
COURT OF APPEALS OF INDIANA

DOROTHY LAVERNE AUSTIN Individually and as Administratrix of the Estate of KENNETH H. AUSTIN, SR. and THERESA L. ABBOTT by and through the United States Bankruptcy Trustee KATHRYN PRY, Appellants-Plaintiffs, vs. GLOBE AMERICAN CASUALTY COMPANY, GRE Insurance Group, Specialty Auto Division, and RONALD HOFFMAN Doing Business As Frontier Adjusters of Columbus, Indiana, Appellees-Defendants.	)	No. 39A05-0606-CV-343

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No.39C01-0101-CP-25

March 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Appellants-plaintiffs Dorothy Laverne Austin ("Dorothy"), individually and as administratrix of the estate of Kenneth H. Austin, Sr. ("Kenneth"), and Theresa L. Abbott ("Abbott") by and through United States Bankruptcy Trustee Kathryn Pry (collectively, "the Appellants") appeal from the trial court's two orders[1] granting summary judgment in favor of appellees-defendants Globe American Casualty Company ("Globe"), GRE Insurance Group Specialty Auto Division ("GRE"), and Ronald Hoffman d/b/a Frontier Adjusters of Columbus ("Hoffman") (collectively, "the Appellees")[2] on Abbott's claims for bad faith and negligent failure to investigate and settle a wrongful death claim and on the Appellants' claims for malicious prosecution and abuse of process. Specifically, the Appellants argue that the trial court erred by granting summary judgment to the Appellees on Abbott's bad faith claim and on the Appellants' malicious prosecution and

[1] The trial court granted summary judgment in favor of the Appellees on all of the Appellants' claims in two separate orders. The trial court's first order granted summary judgment to the Appellees on the bad faith claim, and the second order granted summary judgment on the negligence, malicious prosecution, and abuse of process claims.

[2] Globe was a "specialty casualty automobile liability insurance carrier" and was a wholly owned subsidiary of GRE. Appellants' App. p. 974. Hoffman was an insurance adjuster and worked as an independent contractor for GRE, who would assign losses to Hoffman for investigation.

abuse of process claims because there are genuine issues of material fact that preclude the entry of summary judgment.[3] Finding no error in the trial court's grant of summary judgment to the Appellees, we affirm the judgment of the trial court.

Facts and Procedural History[4]

On April 16, 1997, Abbott was driving her vehicle near an intersection in Jefferson County when she collided with another vehicle driven by Kenneth. Kenneth later died as a result of the injuries sustained in the collision. Abbott received a ticket for failure to stop or yield the right-of-way. At the scene of the collision, Abbott told the investigating police officer that she had stepped on her brakes but that she could not stop. A mechanic from the towing company drove Abbott's vehicle and visually inspected the brakes and informed the investigating officer that the brakes were "O.K." Appellants' App. p. 196. The mechanic did not perform a mechanical inspection of the vehicle. At the time of the accident, Abbott was insured under an automobile policy issued by Globe to John Abbott. The policy had bodily injury liability limits of $25,000.00 per person and $50,000.00 per occurrence. Kenneth was insured under an automobile policy issued by State Farm Insurance Company ("State Farm"), and his policy included underinsured motorist benefits.

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[3] The Appellants do not appeal the trial court's grant of summary judgment on Abbott's claim for negligent failure to investigate and settle an insurance claim.

[4] Oral argument was held in Indianapolis, Indiana on February 20, 2007. The Indianapolis Bar Association's Bar Leader Series participants watched the argument. We thank counsel for their able presentations that aided the educational process for our young bar leaders.

On May 2, 1997, GRE sent an "excess limits letter" to Abbott. *Id.* at 357, 1163. On May 20, 1997, Dorothy was appointed as administratrix and personal representative of Kenneth's estate. On June 25, 1997, Dorothy's counsel, Peter King, mailed a letter ("demand letter") to GRE's claims adjuster Betty Eash and indicated that he "would anticipate a policy offer by [GRE] within the next ten (10) days" and that if an offer was not "forthcoming, [he] w[ould] advise [his] client [Dorothy] to take the necessary steps that are available to her to protect the interest of the estate." *Id.* at 187-188. On July 7, 1997, Eash forwarded a fax to Dorothy's counsel informing him that his demand letter was received while she was out of the office and that she had requested authorization to settle Dorothy's claim for $25,000.00.

On July 8, 1997, Eash received information that the rotors on Abbott's brakes were broken and that she had received money back from the repair shop that had allegedly fixed her brakes prior to the accident. Eash then telephoned Dorothy's counsel to inform him of the status of Abbott's brakes and that they would have to investigate the matter further. Eash also contacted Hoffman with instructions to obtain additional information from Abbott regarding the brake work on her vehicle and the repair shop. On July 11, 1997, Dorothy's attorney sent Eash a letter confirming their telephone conversation regarding the issue with Abbott's brakes and that GRE was not offering to pay the policy limits at that time. The July 11, 1997, letter also indicated that Dorothy was going to proceed by litigating the matter and that "a policy limits offer by GRE Insurance Group on behalf of Ms. Abbott would have prevented such litigation." *Id.* at 194.

Three days later, on July 14, 1997, Dorothy filed a complaint for wrongful death against Abbott on behalf of herself and Kenneth's estate. On August 7, 1997, less than four months from the accident and within three weeks of the complaint being filed, GRE offered to pay Dorothy the $25,000.00 policy limits of Abbott's policy. Two weeks later, Dorothy's attorney sent GRE a letter rejecting the $25,000.00 policy limit offer and demanding $850,000.00 to settle the claim.

Nearly one year later, after Dorothy had settled her underinsured claims with State Farm, Globe filed a complaint for interpleader and declaratory judgment against Dorothy, Abbott, and State Farm. In its complaint, Globe alleged that it might be exposed to multiple liability on Abbott's $25,000.00 liability policy limit due to "the claim of . . . [Dorothy] and the potential claims of State Farm" and that it could not "pay any part of its limits to . . . [Dorothy] without danger of being alleged to have done so improperly by State Farm, at a later date, should they also file a subrogation claim as a result of the accident." *Id.* at 1132. Globe sought leave to deposit the $25,000.00 in the clerk's office and sought an order from the trial court that based upon the language in Abbott's policy, Globe's duty to indemnify Abbott for liability from the accident would be discharged upon paying the $25,000.00 liability limits.[5]

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[5] The policy language, as cited in Globe's complaint, provides:

PART 1 LIABILITY

Coverage A & B Liability Coverage

In September 1998, Dorothy filed a motion to dismiss Globe's complaint pursuant to Indiana Trial Rule 12(B)(6). Globe replied to Dorothy's motion and "admit[ted] that it [was] no longer potentially exposed to double or multiple liability due to the fact that State Farm Mutual Automobile Insurance Company disclaimed their rights to any part of [Globe's] insurance policy" and that "[t]hus, interpleader may not be appropriate." *Id.* at 1185. Globe contended, however, that its action for declaratory judgment should not be dismissed because "it [was] presented with an actual controversy involving its insured's [Abbott's] policy of insurance" due to Dorothy's refusal to accept Globe's offer of its policy limits. *Id.* at 1187. The trial court granted Dorothy's motion and dismissed Globe's complaint.

On February 17, 1999, a jury trial was held on Dorothy's wrongful death claim against Abbott. The jury rendered a verdict for Dorothy in the amount of $166,500.00 and attributed 53% of the fault to Abbott and 47% to Kenneth. Thereafter, GRE paid Dorothy $25,836.00—the policy limits plus interest.

In October 1999, Abbott filed a petition for bankruptcy in the United States Bankruptcy Court. The bankruptcy trustee, Kathryn Pry, filed an application to employ special counsel, alleging that Abbott "may have a claim against her insurance company

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> We will pay damages for which any insured person is liable because of bodily injury (Coverage A) or property damage (Coverage B) arising out of the ownership, maintenance or use of an insured car.
>
> We reserve the right to defend or settle any suit or claim for damages, as we think appropriate. We will not defend any suit, <u>nor will we settle or pay any amount after our limit of liability has been offered or paid</u>.

Appellants' App. p. 1133 (emphasis in original).

for an excess verdict" and requesting to hire King, Dorothy's counsel, to represent the trustee in an excess verdict claim against Abbott's insurance company. *Id.* at 1149. The bankruptcy court approved the bankruptcy trustee's application for special counsel.

Thereafter, Dorothy and Abbott, by and through the bankruptcy trustee, filed the underlying action against the Appellees. In their joint complaint, Abbott alleged claims for bad faith and negligent failure to investigate and settle a wrongful death claim, and both Appellants alleged claims for malicious prosecution and abuse of process based on Globe's action for interpleader and declaratory judgment.

The Appellees filed a motion for summary judgment, alleging that there were no genuine issues of material fact as to any of the Appellants' claims and that they were entitled to judgment as a matter of law. The Appellees argued that they were not negligent and did not act in bad faith because GRE needed to complete its investigation prior to attempting resolution of Dorothy's claim and because "[t]he evidence clearly establishes that GRE did not refuse to pay policy proceeds, cause unfounded delay in making payment, deceive the insured or exercise any unfair advantage to pressure the insured into settlement[.]" *Id.* at 1198. The Appellees argued that they were entitled to summary judgment on the Appellants' malicious prosecution claims because Globe had probable cause to institute the interpleader and declaratory judgment action based upon its reliance upon counsel's advice. Finally, the Appellees argued that they were entitled to summary judgment on the Appellants' abuse of process claims because the filing of its complaint for declaratory judgment and interpleader "was procedurally correct and the

appropriate avenue to settle and afford it relief from uncertainty and insecurity with respect to its rights, status and other legal relations." *Id.* at 1207.

The Appellants filed their response to the Appellees' summary judgment motion. In it, they argued that the Appellees were not entitled to summary judgment on Abbott's bad faith claim because bad faith was a question of fact that precluded summary judgment. The Appellants also argued that the Appellees were not entitled to summary judgment on the Appellants' malicious prosecution and abuse of process claims because the Appellees could not rely on an advice of counsel defense due to the fact that they had failed to plead such in their answer.

The Appellees filed a motion to amend its answer to the complaint, in which it proposed to add an affirmative defense of reliance on counsel. During the summary judgment hearing, the trial court heard argument regarding the motion to amend the answer and granted the Appellees' motion. *See* Tr. p. 18.

On June 5, 2006, the trial court issued an order, which granted summary judgment to the Appellees on Abbott's bad faith claims and "granted [the Appellees'] Motion to Amend Answer to Complaint[.]" Appellants' App. p. 17. The June 5th order provides, in relevant part:

> This case is against an insurance company that had a $25,000 policy covering an automobile driven by Theresa L. Abbott. That car was involved in a fatal collision after running a stop sign on April 16, 1997 and striking another automobile. The accident resulted in the death of the driver of the other vehicle. On June 25, 1997 counsel wrote a demand letter to the Defendant insurance company demanding policy limits within 10 days. Because the company had been told by Ms. Abbott that there was a brake failure problem with her car, they took the time to look into that issue. On July 14, 1997 the estate of the decedent filed suit. On August 7,

> 1997 the insure[r] offered its policy limits. This offer was refused, the case went to trial, and a verdict of $166,500 was obtained. This action was brought for the excess amount.
>
> The Court finds there is no genuine dispute of material fact, and finds that the Defendants are entitled to judgment as a matter of law. A period of forty-three (43) days from demand to paying full policy limits is not an unreasonable period of time under the circumstances of this case, and does not rise to the dignity of an actionable tort.

Id. at 18. On June 9, 2006, the trial court issued another order granting summary judgment in favor of the Appellees on Abbott's claim for negligence and on the Appellants' claims for malicious prosecution and abuse of process. The Appellants now appeal.

Discussion and Decision

The Appellants contend that the trial court erred in granting summary judgment in favor of the Appellees on Abbott's bad faith claim and on the Appellants' malicious prosecution and abuse of process claims. As we consider the Appellants' contention, we note that summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001); *see also* Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. *Owens Corning*, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. *Id.* If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. *Id.*

An appellate court faces the same issues that were before the trial court and follows the same process. *Id.* at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. *Id.* When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. *Id.* We now turn to the Appellants' specific arguments.

I. Bad Faith

The Appellants argue that the trial court erred in granting summary judgment in favor of the Appellees on Abbott's claim that GRE breached its duty to deal with her in good faith. Indiana law has long recognized that there is a legal duty implied in all insurance contracts that the insurer deal in good faith with its insured. *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 518 (Ind. 1993). In *Hickman*, our Supreme Court recognized a "cause of action for the tortious breach of an insurer's duty to deal with its insured in good faith." *Id.* at 519. The obligation of good faith and fair dealing with respect to the discharge of the insurer's contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim. *Id.*

A good faith dispute about the amount of a valid claim or about whether the insured has a valid claim at all will not supply the grounds for a recovery in tort for the breach of the obligation to exercise good faith. *Id.* at 520. "That insurance companies may, in good faith, dispute claims, has long been the rule in Indiana." *Id.* Additionally,

"the lack of diligent investigation alone is not sufficient to support an award." *Id.* On the other hand, an insurer that denies liability knowing that there is no rational, principled basis for doing so has breached its duty. *Id.*

The Appellants first argue that the trial court's entry of summary judgment in favor of the Appellees was erroneous because the trial court "misapprehended the facts and erroneously found that Defendant GRE *paid* the policy limits within 43 days of [Dorothy's] demand." Appellants' Br. p. 12 (emphasis added). The Appellants contend that the trial court's "misapprehension of the facts of the case and that reliance on that mistake of fact warrants reversal of the Court's order granting the [Appellees] Summary Judgment." *Id.* at 12-13.

In its June 5th summary judgment order, the trial court noted:

> The Court finds there is no genuine dispute of material fact, and finds that the Defendants are entitled to judgment as a matter of law. A period of forty-three (43) days from demand to *paying* full policy limits is not an unreasonable period of time under the circumstances of this case, and does not rise to the dignity of an actionable tort.

Appellants' App. p. 18 (emphasis added). However, the 43-day duration was between Dorothy's demand letter—June 25, 1997—and GRE's *offer to pay* the policy limits to Dorothy—August 7, 1997. After GRE offered to pay the $25,000.00 policy limits to Dorothy, she rejected the offer. On February 17, 1999, the case proceeded to trial, and a jury rendered a verdict for Dorothy in the amount of $166,500.00 and attributed 53% of the fault to Abbott and 47% to Kenneth. Thereafter, GRE paid Dorothy $25,836.00.

The Appellees respond that the trial court "was under no misapprehension that the policy was paid on August 7, 1997" and that the trial "court's focus [was] clearly on the

forty-three (43) day time period between demand and offer, which, if accepted, would have resulted in the actual payment." Appellees' Br. p. 6. We agree. We cannot say that the trial court's mistaken reference to "paying" instead of "offering" the policy limits rendered its grant of summary judgment erroneous.

The Appellants next argue that the trial court erred in granting summary judgment in favor of the Appellees on Abbott's claim that GRE breached its duty to deal with her in good faith because there was a question of fact regarding whether GRE's handling of Dorothy's claim was in bad faith. Specifically, the Appellants contend that GRE breached its duty to deal with Abbott in good faith when it failed "to move promptly" to resolve Dorothy's claim against Abbott and failed to settle Dorothy's claim upon Dorothy's demand letter for policy limits. Appellants' Br. p. 20. The Appellants also argue that GRE breached its duty to deal with Abbott in good faith when it failed to inform Abbott of Dorothy's demand for policy limits, and they contend that "[h]ad [Abbott] known that [Dorothy made a policy limit demand], she would have told her GRE attorney to take the offer and settle."[6] *Id.* at 14.

The Appellees argue that "[t]he issue of bad faith was appropriate for summary judgment and no genuine issue of material fact existed regarding the claims handling of Dorothy's wrongful death claim against Abbott." Appellees' Br. p. 6. Specifically, the

[6] During oral argument, counsel for the Appellees argued that the dispute about whether Abbott knew of the policy limit demand was not an issue of material fact because GRE would not have been required to pay the policy limits upon Abbott's insistence. We agree. The designated evidence reveals that Abbott's insurance policy with GRE provided that GRE "reserves the right to defend or settle any suit or claim for damages, as we [GRE] think appropriate." Appellants' App. p. 1027. Furthermore, we reject the Appellants' hindsight argument regarding what Abbott would have done; the test is not if she would have told them but whether GRE acted in bad faith in investigating a claim.

Appellees assert that "[t]here is no genuine issue as to why GRE delayed offering the policy limits, when it was Abbott that continued her assertion of a brake problem" and that based on the jury verdict finding that Kenneth was 43% at fault for the accident, GRE "had a rational basis for questioning liability and the less than two month time period that passed before GRE offered its' [sic] policy limits fails to support a bad faith claim." *Id.* at 8-9.

In reviewing the Appellants' contention that GRE acted in bad faith with its insured—Abbott—when it failed to settle a third party's—Dorothy's—claim for the policy limits, we note that such an argument would fall under the *Hickman* category of "causing an unfounded delay in making payment." *See Hickman*, 622 N.E.2d at 519. An insurer may be subject to a potential bad faith lawsuit against it by an insured if the insurer fails to settle a claim within policy limits and if a trial resulted in a verdict in excess of the policy limits. *See Economy Fire & Cas. Co. v. Collins*, 643 N.E.2d 382, 385-86 (Ind. Ct. App. 1994), *reh'g denied*, *trans. denied*. If an insurer is found to have engaged in bad faith, the insurer would be held liable for the entire excess judgment and would be required to compensate the insured or the insured's assignees. *Id.*

Here, the undisputed facts reveal that on the day of the accident between Abbott and Kenneth, Abbott told the investigating officer that her brakes did not function properly. Although on that day a mechanic visually inspected the brakes and indicated that they were "O.K.," Abbott reported that the rotors on her brakes were broken and that she received money back from the repair shop that allegedly fixed her brakes. Appellants' App. p. 196. This information came to GRE approximately two weeks after

Dorothy's demand letter and less than one week before Dorothy's counsel filed suit on her behalf against Abbott. Within one month of receiving information from Abbott of the possible brake problem, GRE offered Dorothy's counsel the policy limits.

Thus, the designated evidence reveals that the delay involved in this case—a mere forty-three days from Dorothy's demand letter to GRE's offer of policy limits—was not unfounded and was, instead, justified to investigate Abbott's brake issue. Because GRE's decision to conduct a further investigation into Abbott's brake issue constituted a rational basis for delaying payment to Austin, we cannot say that the trial court's grant of summary judgment to the Appellees on Abbott's claim of bad faith was erroneous.

Nevertheless, the Appellants contend that there is a question of fact regarding whether the delay in offering policy limits constituted bad faith because GRE's investigation into the brake issue was not done in Abbott's best interest but was only done to protect itself and establish a subrogation claim. But, the brake issue was not a mere subrogation issue and would have been germane to a comparative fault issue. As counsel for the Appellees pointed out in the oral argument, an unexpected failure of Abbott's braking equipment would be relevant to the assertion of a defense. Indeed, Indiana Code § 34-51-2-14 provides that "[i]n an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. This defense is referred to in this chapter as a nonparty defense."

Finally, in their brief and during oral argument, the Appellants cited to *Hoosier Insurance Co. v. Audiology Foundation of America*, 745 N.E.2d 300 (Ind. Ct. App. 2001), *reh'g denied*, *trans. denied*, to support their argument that the issue of bad faith is

a question of fact for the jury to decide. In *Hoosier Insurance*, the insured sought out a stipulation with a third party and then used the contents of that stipulation as a reason for denying coverage to its insured. 745 N.E.2d at 304. We concluded that a genuine issue of material fact existed regarding whether the insured acted in bad faith specifically because of the manner in which the insured denied coverage to the insured on the insured's own claim for coverage. *Id.* at 311.

The case at bar, however, is not a denial of coverage case and does not involve any evidence that any of GRE's own actions precipitated its decision to conduct a further investigation. Indeed, the delay in GRE's offer of payment to Dorothy resulted from information from its own insured, Abbott. Because there is no material issue of fact regarding whether GRE acted in bad faith, the trial court's grant of summary judgment to Appellees on Abbott's bad faith claim was not erroneous.[7]

II. Malicious Prosecution

The Appellants next argue that the trial court erred by granting summary judgment to the Appellees on their malicious prosecution claim. Specifically, the Appellants contend that the Appellees engaged in malicious prosecution against both Dorothy and Abbott when Globe filed its action for interpleader and declaratory judgment. The Appellees argue that the trial court properly granted summary judgment in their favor on

[7] Finally, we note that in their brief and during oral argument, the Appellees asserted that "[t]his is a case about a premeditated attempt by plaintiff to try a[nd] create a scenario in which the real goal was never to obtain just the policy limits but substantially more, by way of a bad faith claim." Appellees' Br. p. 10. We disagree.

the malicious prosecution claim because Globe relied upon the advice of counsel and had probable cause for bringing the action for interpleader and declaratory judgment.

The essence of a malicious prosecution claim rests on the notion that the plaintiff has been improperly subjected to legal process. *City of New Haven v. Reichhart*, 748 N.E.2d 374, 378 (Ind. 2001). The elements of a malicious prosecution action are: (1) the defendant instituted or caused to be instituted an action against the plaintiff; (2) the defendant acted maliciously in so doing; (3) the defendant had no probable cause to institute the action; and (4) the original action was terminated in the plaintiff's favor. *Id.* A defendant is entitled to judgment as a matter of law when undisputed material facts negate at least one element of a plaintiff's claim. *Douglas v. Monroe*, 743 N.E.2d 1181, 1184 (Ind. Ct. App. 2001). When the facts are uncontroverted, the existence or nonexistence of probable cause is a question of law to be decided by the court, thus, making it appropriate for summary judgment. *Maynard v. 84 Lumber Co.*, 657 N.E.2d 406, 408-09 (Ind. Ct. App. 1995), *trans. denied*. "[P]robable cause exists 'when a reasonably intelligent and prudent person would be induced to act as did the person who is charged with the burden of having probable cause.'" *Reichhart*, 748 N.E.2d at 379 (quoting *Maynard*, 657 N.E.2d at 409).

In addition, "[t]he advice of counsel defense is an absolute defense to a malicious prosecution action." *Satz v. Koplow*, 397 N.E.2d 1082, 1086 (Ind. Ct. App. 1979). To establish such a defense, the defendant must show that before commencing an original action, he honestly and in good faith sought the advice of a reputable counsel to whom he gave a full and fair statement of all material facts. *Id.* If the defendant then instituted the

original action relying on the attorney's advice, the defendant cannot be held liable in a subsequent malicious prosecution suit, even though the attorney's advice was erroneous. *Id.*

As part of their designated evidence, the Appellees presented an affidavit from Jim Tomlinson, an adjuster with Globe, who stated that he consulted with a competent attorney, provided the attorney full disclosure of the facts, sought the attorney's advice on how to proceed, was advised that a judicial determination was required to resolve the legal questions regarding Globe's obligations and rights regarding Dorothy, Abbott, and State Farm, and then relied on counsel's advice in deciding to pursue the declaratory judgment and interpleader action. Appellants' App. p. 1183-84. Specifically, the affidavit provided, in relevant part:

* * * * *

> 8. On or about August 7, 1997, Globe offered Abbott's policy limits to [Dorothy] and [Dorothy] denied the offer.
>
> 9. At the time of the accident, State Farm Mutual Automobile Insurance Company ("State Farm") had a policy of insurance insuring Kenneth H. Austin, which included underinsured benefits.
>
> 10. That Globe retained . . . Timothy Gray and the law firm of Boehl, Stopher & Graves in New Albany, Indiana, provided them full disclosure of the facts and sought their counsel on how to proceed.
>
> 11. Globe was advised that a judicial determination was required to resolve the legal question of Globe[']s obligations and rights regarding plaintiffs.
>
> 12. Globe's adjuster handling the file, Jim Tomlinson, is not an attorney and retains attorneys for the purpose of their knowledge, expertise and counsel.

13. Jim Tomlinson had worked with attorney Timothy Gray before and had every reason to believe he was competent.

14. Per counsel's advise [sic], on or about August 17, 1998, Globe filed its' [sic] Complaint for Interpleader and Declaratory Judgment against [Dorothy], State Farm and Abbott in which it alleged that it could not determine which of the defendants, State Farm or [Dorothy], was entitled to the payment, or what sums, if any, should be paid to each from the available policy limits and also requested that it be allowed to deposit the policy limits of $25,000.00, with the clerk of the Jefferson Circuit Court, for distribution as directed by the Court.

15. Globe also asked for a determination as to its obligations to indemnify Theresa Abbott and determine its liability as to the plaintiffs.

16. Globe relied on their counsel's advice in deciding to pursue a declaratory judgment.

Appellant's App. p. 1183-84.

In their reply brief, the Appellants argue that the Appellees "are asserting a defense to which they are not entitled based on the record below." Appellants' Reply Br. p. 14. First, the Appellants contend that the Appellees have waived their advice of counsel defense because they did not plead the defense in their answer. However, prior to the summary judgment hearing, the Appellees filed a motion to amend their answer to include an affirmative defense of reliance on counsel. *See* Appellants' App. p. 14; Tr. p. 5. The trial court granted the Appellees' Motion to Amend Answer to Complaint. *See* Tr. p. 18.

Second, the Appellants contend that there is a material issue of fact as to whether Globe relied on the advice of counsel in initiating this action. But the Appellants do not challenge Tomlinson's affidavit or point to any of their own designated evidence to

dispute the Appellees' evidence that Globe instituted the original action relying upon the advice of counsel.[8]

Finally, notwithstanding the Appellees' advice of counsel defense, the designated evidence reveals that Globe had probable cause to institute the declaratory judgment and interpleader action. At the time Globe filed its declaratory judgment and interpleader action, Dorothy had her pending suit against Abbott, State Farm had filed a "notice of subrogation" with Hoffman, and Dorothy had settled her uninsured claim with State Farm. Appellant's App. p. 398. In addition, the undisputed evidence reveals that Abbott's insurance policy with GRE contained a provision that GRE would not "settle or pay any amount after our limit of liability has been offered or paid" and that GRE had offered the $25,000.00 policy limits to Dorothy, who had refused them. *Id.* at 1027. Thus, Globe was potentially exposed to multiple liability and had an interpretation issue with Abbott's insurance policy. Because the Appellees designated evidence established a defense and otherwise negated the probable cause element of the Appellants' malicious prosecution claim, the trial court did not err by granting summary judgment on this issue.

III. Abuse of Process

The Appellants contend that the trial court erred by granting summary judgment to the Appellees on their abuse of process claim. Specifically, the Appellants argue that there is a genuine issue of material fact regarding the intent behind the Appellees'

[8] The Appellants filed a motion to strike portions of Tomlison's affidavit, but the trial court denied the motion during the summary judgment hearing. On appeal, the Appellants do not challenge the trial court's ruling on their motion to strike.

"pattern of dubious conduct[.]" Appellants' Br. p. 25. On the other hand, the Appellees contend that Globe's act of filing its action for interpleader and declaratory judgment was procedurally and substantively proper under the circumstances and, thus, was not an abuse of process.

The elements of an abuse of process claim are: (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Reichhart v. City of New Haven*, 674 N.E.2d 27, 31 (Ind. Ct. App. 1996), *trans. denied*. "Process" involves the "use of the judicial machinery" and is given "an expansive definition and includes actions undertaken by a litigant in pursuing a legal claim." *Id.* at 32 (citation and internal quotations omitted). The test of an improper process is whether the legal steps were procedurally and substantively proper under the circumstances. *Reichhart*, 748 N.E.2d at 379. "Unlike malicious prosecution, abuse of process does not require proof that the action was brought without probable cause or that the action would have terminated in favor of the party asserting abuse of process." *Central Nat'l Bank of Greencastle v. Shoup*, 501 N.E.2d 1090, 1095 (Ind. Ct. App. 1986), *reh'g denied*.

A party may not be held liable for abuse of process if the legal process has been used to accomplish an outcome that the process was designed to accomplish. *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1029 (Ind. Ct. App. 2005), *trans. denied*. "If a party's 'acts are procedurally and substantively proper under the circumstances' then his intent is irrelevant." *Id.* (quoting *Reichhart*, 674 N.E.2d at 31). In other words, "there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Lake*

County Trust Co. v. Wine, 704 N.E.2d 1035, 1041-42 (Ind. Ct. App. 1998) (citations and internal quotations omitted).

Although the Appellants allege that the Appellees had ulterior motives in filing their declaratory judgment and interpleader action, the designated evidence reveals that Globe's use of process was proper in the regular course of the proceeding. It is undisputed that at the time Globe filed its declaratory judgment and interpleader action, that Dorothy had her pending suit against Abbott, that State Farm had filed a "notice of subrogation" with Hoffman, and that Dorothy had settled her uninsured claim with State Farm. Appellants' App. p. 398. In addition, the undisputed evidence reveals that Abbott's insurance policy with GRE contained a provision that GRE would not "settle or pay any amount after our limit of liability has been offered or paid" and that GRE had offered the $25,000.00 policy limits to Dorothy, who had refused them. *Id.* at 1027.

Based on the record before us, we conclude as a matter of law that the Appellees' use of process for the purpose of initiating and continuing the suit for interpleader and declaratory judgment was a legitimate use of the judicial system. *See KLLM, Inc. v. Legg*, 826 N.E.2d 136, 145 (Ind. Ct. App. 2005) (providing that the purpose of a declaratory judgment action is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations), *trans. denied*; *Euler v. Seymour Nat'l Bank*, 519 N.E.2d 1242, 1244 n.2 (Ind. Ct. App. 1988) (explaining that "[a]n interpleader action typically involves a neutral stakeholder, usually an insurance company or a bank, seeking apportionment of a common fund between two or more parties claiming an interest in it"). Because the Appellees' use of process was proper, the

Appellants have no claim against the Appellees for abuse of process. *See Watson*, 822 N.E.2d at 1029 (holding that a party will not be held liable for abuse of process if the legal process has been used to accomplish an outcome that the process was designed to accomplish); *Reichhart*, 674 N.E.2d at 31 (holding that a party must first establish that the defendant employed improper process before the court proceeds to an examination of the defendant's motivation). Accordingly, the trial court's entry of summary judgment in favor of the Appellees on the Appellants' abuse of process claim was proper.

Affirmed.

DARDEN, J., and ROBB, J., concur.